

as pursue multiple vendors on its broadband network.”<sup>84</sup> The same article also states that AT&T has been meeting with MindSpring Enterprises, Inc, Atlanta city officials and with FCC officials to devise an access plan in Atlanta.<sup>85</sup>

That non-discriminatory access will not discourage investment in cable infrastructure was emphasized in the affidavit of former Telecommunications Planner for VDPS, William Shapiro, in *Internet Ventures*, Case Identifier CSR-5407-L:

Cable companies enjoy a temporary technological advantage over other competing forms of high speed technologies that they have every incentive to seize upon. Currently, Hughes offers a hybrid service, DirecPC, offering 56kb/s upstream via telephone modem and 400kb/s downstream via satellite. These are speeds that still are less than the speeds available from cable. Cable companies state that their modems can offer an approximate speed of 10 Mb/s downstream, touted for up to 30 Mb/s, with slower upstream speeds varied and priced accordingly. To be sure, companies like Hughes Electronics have announced plans to offer higher speed satellite services - speeds higher than current cable speeds - but these plans, like Hughes’ Spaceway service, are still several years away from deployment. Cable companies are not likely to squander the opportunity to reach new subscribers for high speed Internet service when there is such a premium in enrolling new subscribers first. I should add that, while competition from satellite companies to offer higher speed Internet connections is a good thing, it does not diminish the importance of protecting competition among Internet service providers. Satellite/cable competition will help to limit monopoly pricing of the “pipe” into the home, but it won’t assure vigorous competition among ISPs (or between cable company video programming and video programming offered by ISPs).

Paragraph 4 *Attachment 17*.

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<sup>84</sup> Leslie Cauley, “AT&T’s Leo Hindery Resigns As Chief of Cable, Net Business (Oct. 7, 1999) <http://interactive.wsj.com/archive/retrieve.cgi?id=SB939214967688976380.djm> (visited on October 9, 1999) (*emphasis added*). See also Peter S. Goodman, “Leading AT&T Cable Executive Resigns Departure Raises Doubts About Company’s Expansion Plans” Washington Post (October 7, 1999; Page E01) <http://search.washingtonpost.com/wp-srv/WPlate/1999-10/07/1311-100799-idx.html> (visited on October 9, 1999).

<sup>85</sup> Leslie Cauley, “AT&T’s Top Cable Executive Resigns Amid Internet-Access Fracas,” The Wall Street Journal at B1, B4 (Oct. 7, 1999).

These statements refute cable industry claims of technical infeasibility. Moreover, Mr. Armstrong's statement that AT&T intends to "*pursue*" arrangements with third party ISPs also discredits cable claims that access conditions will discourage cable investment.

Consider the illogic of the cable companies' argument. Under Section 612 of the Act, a cable operator is entitled to reasonable compensation from those who lease its cable capacity.<sup>86</sup> It bears emphasis that, as applied by the Commission, this standard does not provide the traditional cost-based compensation a regulated utility would be allowed under a "just and reasonable" rate standard.<sup>87</sup> Rather, cable companies will continue to enjoy the considerable pricing flexibility that has allowed them to raise overall rates regularly and with seeming impunity. Under the Commission's implicit pricing standard, regulation of leased access rates simply assures the lessee that it will pay no more than a proportionate share of what the cable company implicitly charges itself and "that a fair leased access rate should compensate the operator for the "implicit fee" it would have earned had it not been required to lease the channel."<sup>88</sup> The purpose of this generous standard is to promote diversity without the creation of a financial burden on the cable operator.<sup>89</sup> "It may be, as Professor Mason argues, "that, as AT&T claims, it will earn even higher profits if permitted to monopolize Internet service over its broadband cable. However, more profit than the already extraordinary profit available from open-access broadband may make AT&T shareholders happy, but it is clearly not a justification for reducing competition or for reducing broadband investments." *Mason Report* at 2, *Attachment 15*. See also F. Bar, S. Cohen, P. Cowhen, B. DeLong, M. Kleeman, J. Zysman,

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<sup>86</sup> *ValueVision Int'l, Inc. v. FCC*, 149 F.3d 1204, 1207 (D.C. Cir. 1998).

<sup>87</sup> *Id.* at 1208.

<sup>88</sup> *Id.* at 1207.

<sup>89</sup> *Id.* at 1209.

“Access and Innovation Policy for the Third-Generation Internet,” Telecommunications Policy, Vol. 24 (July/August 2000). (Bar Study) (*Attachment 16*).

Internet traffic is growing at rapid rates. If, as cable operators argue, other broadband technologies will try to secure a share of Internet traffic on their networks, cable companies stand to lose by not attempting to do likewise. Why then, would they want to deny access to their facilities to companies willing to pay for use of cable capacity? The only logical answer is that they believe they can earn supra-competitive returns on their own broadband ISP services. That, in turn, would only be possible if they believed they faced only limited competition from other broadband providers—at least in significant portions of their service areas. In fact, that is a very sound assumption.

First, as MIT Professor Jerry A. Hausman details in his October 28, 1998, affidavit submitted in CS Docket No. 98-178,<sup>90</sup> cable companies have significant market power in the delivery of video programming over high speed multi-channel distribution networks. This market power, he notes, makes it profitable for cable companies to tie the delivery service to the provision of service by their unregulated ISPs, like @Home and RoadRunner. *See also* Bar Study at 13-26, *Attachment 16*; *Mason Report, Attachment 15*. Cable companies not only have access to high speed connections to facilitate customer purchase of ISP service from cable affiliates, they have high speed Internet access to allow purchase of their video programming. In Vermont, Charter Communications offers Internet Service, but only if the customer buys basic cable service. Adelphia, the other major cable operator in the state, charges \$10 more per month for its ISP service if the customer does not purchase basic cable.

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<sup>90</sup> “Joint Applications of AT&T Corporation and Tele-Communications, Inc. for Transfer of Control to AT&T of Licenses and Authorizations Held by TCI and Its Affiliates or Subsidiaries.”

Further, as Vermont noted in its initial comments in *Internet Ventures, supra*, there are two other types of broadband technologies that may be available to consumers. These include DSL available over telephone wires and high-speed data communications over satellite. The former, as Vermont noted earlier, is not technology that will be available anytime soon to rural customers or even to many customers in more densely populated areas.<sup>91</sup> As to broadband technology using satellites, cable companies have a technological time advantage. Satellite companies are not expected have true high speed broadband ISP service available for several years.<sup>92</sup> Cable companies are not likely to squander this competitive leg up simply to keep competing ISP providers from using their cable facilities. On the contrary, since cable companies will receive remuneration from ISPs for the leased access they provide, cable companies will have every incentive to sign ISPs up and to expand their plant in order to keep ahead of their broadband competitors. Moreover, as Professor Mason notes, satellite is a “lower quality option” and “fairly expensive.” *Mason Report, supra* at A-4. *Attachment 15*. Denying leased access to ISPs will not spur new investment in broadband technology, it will only serve to give cable-owned ISPs an unfair competitive advantage, depriving communities of programming diversity, more competition and choice of ISP services in the process.

The Commission should not confuse competition in the provision of broadband services—a desirable but distinct goal—from competition among ISPs. ISP service is not a fungible commodity<sup>93</sup> and competition among ISP providers will benefit consumers just as

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<sup>91</sup> See *Vermont Telecommunications Plan 2000 (August 2000)*, [www.state.vt.us/psd/te100.htm](http://www.state.vt.us/psd/te100.htm), at 2-53-58 (August 2000) <http://www.state.vt.us/psd/tel2000full.pdf>. See also Bar Study at 19 (describing high switching costs associated with --- from cable to DSL); *Mason Report* at A, A-3-4, *Attachment 15*.

<sup>92</sup> See *Attachment 14*.

<sup>93</sup> See, e.g., *Bar Study, supra* at 30 (differences in streaming video, web listing, caching, price, proprietary content, newsgroup access).

competition to provide the pipe into the home will do so. The Commission does not face an either-or choice between encouraging competition in broadband and facilitating competition among ISPs.

The market power of cable providers over high-speed access is self-evident. In a competitive marketplace, sellers, except for reasons of creditworthiness or the like, do not ordinarily turn down customers when they have the inventory or capacity to serve them. There is no logical reason, other than a desire to suppress competition from unaffiliated ISPs or from Internet based video programmers—and an expectation that this course would be effective—for the cable operator to forego reasonable compensation for use of its capacity.<sup>94</sup> The ability to make exclusionary practices stick is the essence of market power.<sup>95</sup>

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<sup>94</sup> As discussed, *infra*, the Commission's regulations plainly entitle the cable operator to reasonable compensation for capacity offered under leased access arrangements.

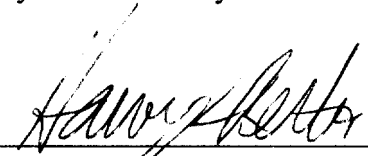
<sup>95</sup> *American Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946) (monopoly power is the power "to raise prices or to exclude competition when it is desired to do so").

## CONCLUSION

For the reasons stated above, the Commission should take prompt affirmative steps to enforce the common carrier obligations of cable systems to provide non-discriminatory access to their cable modem platforms.

Respectfully submitted,

By Their Attorneys

  
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